property rights under the laws of Tennessee, and by that process equality is attained at the expense of law.

The demonstration of the inexpediency of ignoring the salutary principle that the lex situs is paramount in regard to foreign real estate, to correct the supposed hardship of this particular case, would be complete if in this instance the chancery court of the city of Bristol, Tenn., should apply the law of that state to the Virginia lands, on the theory that inequitable consequences would flow from upholding the doctrine of Headrick *v.* McDowell. Such procedure on the part of the Tennessee court would produce an irreconcilable conflict between the courts, incidentally affecting real estate outside of their respective jurisdictions, and resulting in opposing methods for the partition of the same estate.

I am therefore of opinion that the Virginia court, in partitioning the Virginia lands, should be uninfluenced by the rights of the parties with respect to the Tennessee lands.

BUCHANAN, J., concurs.

Note.

Because of the strong dissenting opinion filed in this case, we deem it of importance to the profession that it should be reported in full at this time. We do not propose to go into a discussion here of the value of dissenting opinions, nor of the propriety of publishing them, for that question has already been adverted to in a previous issue of the Register (11 Va. Law Reg. 899) in a note to Standard Oil Co. *v.* Commonwealth. As in that case, so in this, the name and ability of the judge who delivered the dissenting opinion, affords ample excuse for so doing.

WILLIAMS *v.* KENDRICK.

Sept. 13, 1906.

[54 S. E. 865.]

Contracts—Illegality—Inducing Breach of Trust—Joint Adventure.—Plaintiff, knowing that R. was the agent and confidential representative of the owner of certain coal lands, induced defendant to go to R. obtain an option through him to purchase the lands for $8 per acre. Defendant obtained such option by agreeing to give R. one-half of the profits on a sale of the lands plaintiff expected to effectuate at the rate of $12 per acre to a corporation with whose agent defendant's brother sustained confidential relations, and the sale was effected in this manner. Held, that the transaction amounted to a scheme to pay R. one-half of the profits in order to induce him to be

false to his employer and that plaintiff was therefore not entitled to recover a portion of such profits from defendant.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 527-530.]

Error to Circuit Court, Tazewell County.

Action by T. J. Kendrick against W. R. Williams. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

Henry & Graham, for plaintiff in error.

Chapman & Gillespie and *A. S. Higginbotham,* for defendant in error.

KEITH, P. This is an action of assumpsit brought by Kendrick against Williams. The declaration contains three counts, the second of which is not relied upon. The first consists of the general counts in assumpsit; and the third states the special contract upon which the plaintiff expects to recover, and sets forth that the plaintiff and defendant agreed to obtain through one Hubert Raven an option contract from the Clinch Valley Coal & Iron Company for the purchase of certain real estate on Indian Creek in Tazewell county, and it was agreed that if a sale of the land could be made during the continuance of the option, the plaintiff should have one-fourth of all the profits; that the option was obtained in pursuance of this agreement; that the land was sold and a profit realized amounting to $8,000, by reason whereof defendant was indebted to the plaintiff in the sum of $2,000, which he then and there undertook and promised to pay to the plaintiff, but, although often requested, has hitherto failed to comply with his promise.

Upon the trial the jury found a verdict for the plaintiff for $1,312.50, upon which judgment was rendered, and the case is before us upon a writ of error.

The errors assigned in the petition are (1) that there was no contract between the parties; (2) that there was no sufficient consideration for the alleged contract; (3) that the original transaction between Williams and Raven having failed and fallen through, any possible connection Kendrick might claim therewith as a partner was ended; and an assignment of error with respect to the defense of the statute of frauds, which is numbered six in the petition, but which really constitutes the fifth assignment. There are also assigned as errors the overruling of the demurrer to the third count, the giving of certain instructions, and the refusal to give other instructions.

Without going into details with respect to these assignments of error, we shall content ourselves with saying that the demurrer to the third count was properly overruled; that the rulings of the

court with respect to instructions given and refused were, in our judgment, correct; that the evidence was sufficient to maintain the verdict of the jury with respect to the contract, its consideration, and the existence of the partnership; and that the defense of the statute of frauds does not apply in a case such as this.

In Howell *v.* Kelly (Pa.) 24 Atl. 224, the Supreme Court of Pennsylvania held that "a partnership for dealing in options in coal lands is not within the statute of frauds so as to prevent recovery by one partner from the other of his share of the profits."

This briefly disposes of all the questions raised except that which constitutes the fourth assignment of error.

After the testimony was closed, the defendant asked the court to give the following instruction:

"The court instructs the jury that if they believe from the evidence that Hubert Raven was the agent of the Clinch Valley Coal & Iron Company, in charge of the land which was the subject of the option given by said company to sell said land or negotiate, in any way, a contract for the sale of said land for said company, and you further believe from the evidence that the plaintiff knew that said Raven was such agent with the aforesaid power conferred upon him by said company, and you further believe from the evidence that the plaintiff, with such knowledge, aided in inducing the said Raven to obtain the option for the defendant for $8 per acre, knowing or believing that the said defendant could sell the same at an increased price, in which increased price the said plaintiff and Raven would share, then the court instructs you that such arrangement and agreement between the said plaintiff and said Raven, and the agreement between the plaintiff and the defendant is illegal as to the plaintiff, and cannot be treated by you as a consideration, or any part consideration, for any contract between the plaintiff and defendant."

The defendant moved to have the verdict set aside, and insists that the evidence, as applied to this instruction, ought to have resulted in a verdict for the defendant.

It seems that Kendrick was a schoolmaster residing in Richlands; that he was also a real estate agent; that he was acquainted with W. R. Williams; that he learned that the Clinch Valley Coal & Iron Company owned three thousand acres of coal lands lying on the waters of Indian Creek, which it desired to sell at the price of $8 per acre; that it had given an option upon this land at that price to one J. N. Harman, which option was to expire early in October, 1901; that the plaintiff was acquainted with Hubert Raven, who also lived in Richlands and had charge of and looked after the lands of the Clinch Valley Coal & Iron Company; that he had talked with Raven a good

deal and had been kept posted by him as to the expiration of Harman's option; that Raven had gotten the option for Harman, and that Raven had told him on one occasion that the Clinch Valley Coal & Iron Company had priced its lands at $8 per acre, and that the company had promised him a commission if he could find a buyer for the lands at that price, but that the company had instructed him that he must make his commission out of the buyer, if he could; and that Raven told him that he was thinking of getting an option and trying to handle the land himself, if Harman did not make a sale. Plaintiff further testified that he knew A. Cummins, who was a dealer in coal lands and was buying for the Faraday Coal & Coke Company; that he had bought lands on Beech Fork and on Indian Creek, in Tazewell county, adjoining the lands of the Clinch Valley Coal & Iron Company; that he believed that this tract of land of the Coal & Iron Company could be sold to Cummins; that he knew Charles P. Williams, a brother of W. R. Williams, the defendant, who surveyed for Cummins; that he had at one time thought of trying to get an option on this land in his own name, but that on reflection he thought it would probably be better to associate W. R. Williams, who it was likely could reach Cummins better; that he had talked to Raven about Williams being a good man to lay the proposition before Cummins; that on the day before the Harman option expired he saw Raven, who told him that the Harman option would expire the next day; that on the day of its expiration he went to see Williams the defendant, and found him in front of his store in Richlands, and said to him: "Doctor, let's you and I go in together and handle some coal lands"; and he asked what lands, and plaintiff told him it was the 3,150 acres of the Clinch Valley Coal & Iron Company, that Harman's option was out that day, and said to him: "Doctor, let's you and I go in together and get an option on that proposition in your name; you go to Raven and tell him that we will give one half of all the profits we may realize out of the sale of these lands, and we will take the other half of the profits; that is, you and I will divide the other half, or I take one-fourth interest all around." The reply of Dr. Williams was, "All right," and he said, "Where is Raven?" Plaintiff says: "I looked down the street and saw Raven crossing the street and said to Williams, 'Yonder Raven goes, go and see him at once.'" That Williams then followed Raven and overtook him and laid the proposition before him; that plaintiff remained standing in front of Williams' store, and when he had finished talking to Raven, Williams immediately came back and plaintiff asked him what Raven had said; that the reply was that it was all right, that Raven would get the option; that Raven wrote to the company and got the option, and it was sent in a few days, duly signed by the company, and in Williams'

name; that it covered the lands that Williams and plaintiff had agreed to get an option on, and sell and divide the profits; that Williams then gave an option on the land to George F. Brewster at $12 per acre for 30 days; that Brewster was the man who was getting options on coal lands for Cummins; that Williams agreed to pay Brewster $1,000 if the sale was put through in 30 days; that the sale was made to Cummins, and the Clinch Valley Coal & Iron Company made a deed to the Faraday Coal & Iron Company; that after Williams and plaintiff had made their agreement, plaintiff gave up his intention of securing an option on these lands in his own name, and afterwards made no effort to secure an option for himself; and that he considered himself bound to Williams by his agreement.

On cross-examination Kendrick said: "I had talked with Raven about Williams being a good man to handle the deal. * * * My reason for associating Williams with me in the deal was that he knew Mr. Cummins, and his brother was surveyor for Cummins, and I thought that Williams could reach the proposed buyer better than I could"; but in response to a question by counsel for defendant, as to whether he had done anything by way of consideration and what he had done, witness stated that he had prepared Raven's mind in favor of Williams; that Raven seemed hostile to Williams and he used his influence to reconcile Raven to Williams by telling Raven his reasons for thinking that Williams was the best man to put the deal through; and in response to a question by counsel for defendant, as to whether Raven was the agent for the Clinch Valley Coal & Iron Company, and whether witness had knowledge thereof or not, he stated: "I knew that the company had about 20,000 or 30,000 acres of land, and that Raven had charge of the lands of the company, and generally looked after the land about Richlands for the company, and kept trespassers off the land; and I knew that Raven had a lease on 8,000 acres of the company's lands about Richlands. If Raven was the agent of the company, I did not know it; I did not know what his powers or authority were. I knew that Raven had no power of attorney to sell the company's lands, and he could not sell the lands, nor give an option on the lands. But I knew that when an option was wanted, the parties would go to Raven, and that he would write to the company for the option and would recommend the parties who wanted the option."

Raven's testimony is that, having passed Dr. Williams and Kendrick, who were in conversation together, Williams followed him and asked him in regard to the option he had secured for Harman on the lands of the Clinch Valley Coal & Iron Company, and whether the option had expired or not, and he told him that it had; that Williams then asked him to get him an op-

tion on the land at $8 an acre, and he though he could sell it for $12 an acre, and if so he would give him half the profits.

Now, according to the evidence of Kendrick, the whole conception was his; that he learned from Raven that the Harman option was about to expire, went to Williams and interested him in the matter, informed him of Raven's relations to the subject, and outlined a contract by which he and Williams were to divide one half of the profits, the other half of which were to be paid to Raven. Paid to him for doing what? He advanced no money, he rendered no service, and was of value solely because of the relations he occupied to the Clinch Valley Coal & Iron Company, for whom he was the manager, and by whom he was authorized to dispose of this land at $8 per acre, his compensation to be paid by the purchaser. Williams was brought in because he had a brother occupying a somewhat confidential relation to Cummins who was acting for the Faraday Coal & Coke Company to whom the land was to be sold. So that the partnership of Kendrick and Williams went into the transaction with a very reasonable expectation of a profit, seeing that they had friends in the confidence of both the prospective seller and buyer.

The learned judge of the circuit court, in speaking of this branch of the case says that he has no doubt of the turpitude of Raven, and that he was guilty of duplicity and double dealing with respect to his principal, the Clinch Valley Coal & Iron Company, but was of opinion that the evidence did not show that Kendrick had any knowledge of it. In his opinion the judge says: "There is only one fact that tends to show that Kendrick did have notice, and that speaks as loudly against Williams as it does against Kendrick, viz., the offer to give him such a large share of the profits but the law does not presume fraud. The presumption is, rather in favor of fair dealing, and two facts appear from the record which tend to explain this: One, Raven had told Kendrick that he was authorized to find a purchaser for this land at $8 per acre, and to get his commissions off of the other side if he could; the other, that Raven was thinking of getting an option himself after the Harman option expired."

It is true that the facts implicate Williams in whatever immorality may attach to the case; but Williams is not asking anything at the hands of the court. Williams merely invokes an established rule of law, and says to the court, it may be with ill-gotten gains in his hands: "You cannot compel me to disgorge at the instance of another party to this wrong, because I am protected by the maxim, 'Ex turpi contractu non oritur actio.'"

There is no assignable motive for bringing Raven into the transaction and agreeing to pay him one-half of the prospective

profits, except that he occupied confidential relations with the owner of the coal lands which were the subject-matter of the contract. Kendrick went to him because of those relations. It is true that Kendrick says that he did not know that Raven was the agent of the Clinch Valley Company, or what his powers and authority were; that he knew he had no power of attorney to sell the company's lands or give an option upon them; but he admits that he knew that when an option was wanted the party would go to Raven. He knew that the company had authorized Raven to sell the land at $8 an acre, requiring him to look to the purchaser for his remuneration. It is certain from the whole case that the parties to this contract saw the end from the beginning; that they knew they could sell, or at least had a most reasonable expectation of selling, these lands at an advance of from $3 to $4 per acre; and this knowledge was common to Raven, to Williams, and to Kendrick. Williams was reluctant to give Raven one-half, but Raven knew that he was a necessary factor without which the transaction could not succeed, and stood out for a contract which paid him one-half of the whole proceeds. His confidential relations to the Clinch Valley Coal & Iron Company rendered him, as we have said, a necessary factor in the transaction. To seduce him from his allegiance to his employer, he was offered one-half of the profits that might accrue to the partnership, and those profits were the direct fruits of his treachery to his employer.

We fully approve the law as stated by the circuit court in its instruction and in its opinion.

In Watson *v.* Fletcher, 7 Grat. 1, the syllabus is as follows: "A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling; nor will it give relief to either partner against the other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contributions, or reimbursement.

"Though the pleadings do not show that the transactions sought to be settled and adjusted arose out of a partnership for gambling; yet if this appears from the evidence taken before the commissioner who was directed to settle the accounts, it is proper for the court to recommit the accounts and direct an inquiry into the consideration on which the claims of the parties are founded."

In McMullen *v.* Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117, it is said that in any action brought in which it is necessary to prove an illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights springing from such contract.

We are of opinion that the circuit court erred in refusing to

set aside the verdict, and for this reason its judgment must be reversed, and the cause remanded for a new trial.

Note.

This case affords an excellent illustration of the maxim in pari delicto potior est conditio defendentis, and somewhat resembles an old English case in which one of two highwaymen, after conducting a thriving business, had the effrontery to come into court to compel an accounting. The well-settled rule on this subject is stated as follows in 15 Ency. Law (2d Ed.), p. 1011: "Where an illegal contract entered into by a partnership as party of the one part is fully executed, and profits arising therefrom come into the hands of one of the partners, the general rule seems to be that he will not be compelled to account to his copartners for their share of such profits; and where the agreement of partnership is illegal on account of the consideration moving between the partners, or the character of the business to be transacted, the courts will not, after business has been transacted, and the profits of the transaction have been received by one partner, compel him to account to the others for his share of such profits," citing among others, Watson *v.* Fletcher, 7 Gratt. 1.

VIRGINIA & S. W. RY. CO. *v.* HILL.

Sept. 13, 1906.

[54 S. E. 872.]

Carriers—Ejection of Passenger—Action—Question for Jury.—In an action against a carrier, held a question for the jury whether more than necessary force had been used in ejecting plaintiff from a train.

[Ed. Note.—For cases in point, see vol. 9. Cent. Dig. Carriers, §§ 1492, 1495.]

Same—Ejection of Passenger—Mistake in Ticket—Refusal to Pay Fare.—A ticket agent, by mistake, gave plaintiff a ticket to an intermediate point instead of one to that point to which he had paid his fare, and, though plaintiff stated the facts to the conductor, he insisted on payment of fare beyond the intermediate point, and on plaintiff's refusal to pay ejected him. Held, that plaintiff's remedy was an action for breach of the contract, and not in tort for the eviction, unless more than necessary force had been used.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1463.]

Same—Action—Instructions.—A ticket agent, by mistake, gave plaintiff a ticket to an intermediate point, and on his refusal to pay fare beyond the intermediate point he was ejected by the conductor, assisted by a passenger, and in an action for the ejection it appeared the plaintiff resisted efforts to eject him, and that after he was ejected he was injured in an altercation with the passenger, and the